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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE THE HOU HAWAIIANS AND MAUI LOA, CHIEF OF THE HOU HAWAIIANS

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

HAWAII HOUSING AUTHORITY, et al.,

Appellants,

v.

FRANK E. MIDKIFF, et al.,

Appellees.

On Appeal from the United States
Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE HOU HAWAIIANS AND MAUI LOA, CHIEF OF THE HOU HAWAIIANS

The Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, submit this brief as *amici curiae*. The Hou ("new" or "reborn" in the Hawaiian language) Hawaiians is a Hawaii-based, nonprofit Native Hawaiian ohana ("tribal body") which advocates and represents the interests of the approximately 8,000 Native Hawaiian applicants for Hawaiian homestead lands before courts, legislatures and administrative agencies,

and which educates the public on Native Hawaiian land rights. The Hou Hawaiians was founded in 1975 and has approximately 300 members. Maui Loa, a Native Hawaiian of at least 50% Hawaiian blood, is the Chief of the Hou Hawaiians. Born Doctor Nui Loa Price and now generally known under the name Maui Loa, he is a well known Hawaiian ethnic artist and craftsman. As Chief of the Hou Hawaiians, Maui Loa devotes much of his time to advocating justice for the Native Hawaiian people. He is a duly registered applicant with the Hawaii State Department of Hawaiian Home Lands for a Hawaiian homestead lot, for which he applied in 1974 pursuant to the Hawaiian Homes Commission Act.

The purpose of this brief is to bring to the Court's attention the situation of the Native Hawaiian people, deprived of their ancestral homelands and landless today, as it may affect the issues presented by the parties. *Amici* take no position respecting affirmance or reversal of the decision below, having confidence that this submission will assist the Court in arriv-

ing at a just result.[1]

INTEREST OF AMICI

Amici file this brief as spokesmen for their brothers and sisters, the Native Hawaiian people who live today in their ancient homeland. This case involves one aspect of the issue which for the Native Hawaiian has importance that overwhelms all others -- the restoration to him of his ancient lands, and his resettlement on them.

Native Hawaiians are today "a landless people in the country of their forefathers." S. Doc. No. 151, *Report of the Joint Committee on Hawaii*, 75th Cong., 3d Sess. 83 (1938). Largely deprived of their ancestral homelands and in the great majority reduced to poverty, as the United States Commission on Civil Rights records, Native Hawaiians are bitter about "the historic loss of their homelands" and wish "to return to their self-sufficiency associated with living off the land and sea." Hawaii

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[1] Appellant and appellees have consented to the filing of this brief amicus curiae. Letters of consent are filed with the Clerk.

Advisory Committee to the U.S. Commission on Civil Rights, *Breach of Trust? Native Hawaiian Homelands* at 7 (October 1980) (hereafter *Breach of Trust*).

The land of Hawaii is closely held or controlled today by a small group of landowners,[2] descendants of those who have invaded the islands from abroad during the last 200 years. By one means or another -- fraud, cajolery, force or purchase at absurd prices -- they have reduced to their own private ownership land that, in ancient Hawaii, the Chiefs and then the King held and administered for the benefit of the whole Hawaiian people.

The statute challenged here, Hawaii's Land Reform Act, recognizes the principle and establishes the possibility that a portion of such holdings may be restored to those for whom *amici* speak, the Native Hawaiians. In supporting the principle *amici* do not say that appellees, or any other particular landholder, should be

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2 See pp. 31-33 infra.

the statute's target. What is important to *amici* is recognition of the principle that a law which permits the taking of such large holdings, and their redistribution to the landless, is in conformity with the Constitution.

ARGUMENT

1.

The Hawaiian Islands were "discovered," as far as the Western world is concerned, by Captain James Cook in 1778. At that time there existed on the islands a settled Polynesian population, which had emigrated from the eastern Pacific over millenia. These people had developed a mature culture, a prosperous economy and a complex, anthropomorphic religion.

The basis of Hawaiian civilization was a land tenure system, called by Westerners feudal.[3] The basic land unit,

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[3] See, for the following description, 1 R. Kuykendall, The Hawaiian Kingdom at

the ahupua'a, was usually a wedge shaped tract of up to 100,000 acres in extent. Its boundaries followed natural features from the summit of a mountain down to the sea. It included inland agricultural and forest lands and coastal fishing lands with access to Hawaii's rich ocean fishing waters; so that normally the ahupua'a was economically self-contained, its entire population gaining its living from the unit. The ahupua'a was in turn divided into smaller sections called 'ili and was further subdivided into individual parcels farmed by the population.

There was no ownership or title to land, as such. All the land of a kingdom was considered to belong to, to be within the gift of, the King or Great Chief of the Kingdom, the alli-'ai moku (literally, "the chief who protects the land that gives the food"). He in turn assigned the ahupua'a to subchiefs, or alii-'aiahupua'a.

9-10 (1968 ed.) (hereafter Hawaiian Kingdom); N. Levy, Native Hawaiian Land Rights, 63 CAL. L. REV. 848, 848-49 (1975) (hereafter Levy); F. Cohen, Handbook on Federal Indian Law at 797-99 (1982) (hereafter Cohen); Breach of Trust at 3.

They would reassign smaller sections to lower ranking chiefs, the konohiki, who administered the land and governed the farmers and other tenants who made up the general population, the maka'ainana ("people of the land"). In sum, government and landholding were inextricably woven together in a single social fabric.

The great Hawaiian King, Kamehameha I, with Western assistance, first united the Hawaiian Islands into a single nation between 1794 and 1810. Kamehameha thereupon became the alli-'ai moku of the entire Hawaiian Island kingdom, with sole authority, as "owner" and as government, over all of the lands of the kingdom. All other chiefs, subchiefs and tenants in turn held at his pleasure; there was no right of inheritance. In short, there was no such concept as fee simple ownership. *Hawaiian Kingdom* at 46-51, 52-53, 73; *Cohen* at 798; *see Levy* at 849. Non-Hawaiians were altogether excluded from landholding. As one traveller found in 1818, "Europeans are not allowed to own land. They receive it on condition that after death it shall

be returned to the King, and during their life time it is not transferable from one to another." *Hawaiian Kingdom* at 60.

After Kamehameha's death in 1819, the native system of land holding began to change under the pressure of Western influence.

> Results of Western contact with Native Hawaiians parallel results of European contact with mainland Indians. Native population fell drastically as traditional systems collapsed. Westerners turned the Islands' traditional, self-sufficient economy into one geared to international trade. A small number of Westerners residing in Hawaii, bolstered by Western warships which intervened at critical times, exerted enormous political influence.

Cohen at 799 (footnote omitted).

English, Russian, French and American settlers began arriving in the islands early in the 19th century. A settlement of American missionaries from New England arrived in 1820 and rapidly Christianized the Islands' population. By 1825, under the guns of an English warship, the Chiefs persuaded the regent for young King Kamehameha III to permit inherited suc-

cession of the land of greater chiefs. *Hawaiian Kingdom* at 119-20. By 1832, the King's power to redistribute land was further curtailed; it was provided that a chief could not be deprived of his land-holding except in a case of violation of law.

Westerners who received "grants" of land from chiefs under the traditional system were dissatisfied with what they considered to be the insecurity of their land titles. They began to demand freedom from the possibility of what they viewed as arbitrary dispossession of their land-holdings. They sought the right freely to sell or transfer their holdings. In 1836, the captains of a U.S. and a British warship urged the Hawaiian government to allow foreigners freely to purchase land in what amounted to fee simple ownership. The King feared that if he allowed private foreign ownership of land, he would not only lose his ancient rights to dispossess the holder and to redistribute the land, but also would lose his governmental authority over the land and its owner. *Hawaiian Kingdom* at 138, 145.

In 1835, an American firm, Ladd & Company, leased a thousand acres on the Island of Kauai, for fifty years at $300 a month, for the cultivation of sugar. That year marked the beginning of the immensely profitable sugar industry in Hawaii, the beginning of the end of the old land tenure system and the beginning of the process that resulted in almost entire Western domination of Hawaiian landholdings. What amounted to a revolution in landholding law in Hawaii began in 1840 and was virtually complete by 1850. *Hawaiian Kingdom* at 175-82.

Hawaii's first Constitution, proclaimed in 1840, reflected the traditional concepts of land ownership. Land, although "owned" by the King, "belonged to the Chiefs and people in common," under the King's management. The Hawaiian common people, while at the bottom of the feudal hierarchy, enjoyed the use of the national land, which carried with it fishing rights, water rights and wood gathering rights in the forests. *Hawaiian Kingdom* at 269-71; *see Liliuokalani v. United States*, 45 Ct.Cl. 418, 425 (1910); *see also*

United States v. Fullard-Leo, 331 U.S.256, 266-69 (1947).

Dramatic change had already begun. The Declaration of Rights of 1839, incorporated in the 1840 Constitution, provided that landed property could no longer be taken from any person, except as expressly provided by law and as long as the owner conformed to the laws of the Kingdom. An 1839 statute formally permitted inheritance of small parcels of land and provided that large holdings could be inherited provided that one third was returned to the King. *Hawaiian Kingdom* at 161. In 1840, twenty-five year leases to foreigners were permitted; in 1841, the term was increased to fifty years. But these changes did not satisfy foreigners' thirst for fee simple ownership, a restriction on them reaffirmed by law in 1843. *Id.* at 161, 239, 271, 275; H. Bradley, *The American Frontier in Hawaii* at 239 (1968) (hereafter *Bradley*).[4]

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[4] It is worth noting that one of the leaders of the 1820 missionaries, Hiram Bingham, strongly opposed liberalizing land ownership in favor of foreigners. He felt

At first the Hawaiian government insisted on its view that the Hawaiian land could not be sold, its title permanently transferred, nor even leased at long term without the government's consent. The first breach came in 1846. A statute enacted in that year permitted sales of land in fee simple to Hawaiian citizens, the restriction on such sales to foreigners remaining in force. *Hawaiian Kingdom* at 276, 279; *Levy* at 857.

Foreign pressure to obtain ownership of land did not abate. In 1846 a commission was named to review the entire land tenure question and to make recommendations for a comprehensive resolution of the issue. The importance of Western influence is reflected in the commission's

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it "would prove disastrous to the native population." Bradley at 279. The missionaries sought to "preserve[] Hawaii for the Hawaiian people." They saw the "crux of the problem" as "ultimate control of the resources of the Islands, and especially of the soil," and they feared that "the real control of Hawaiian agriculture -- and hence of the economic life of the nation -- would pass into the hands of aliens." Id. at 365-66. In fact this is exactly what happened. See pp. 17-22 infra.

composition: two Hawaiians, two Westerners, and one half-Hawaiian. *Hawaiian Kingdom* at 280; *Levy* at 853.

The result of the commission's work was what has come to be known as "the Great Mahele" of 1848. The principle of the Mahele ("division" in Hawaiian) was that the lands of the kingdom, until then held in feudal title by the King in trust for the chiefs and common people, would be divided in three parts: one part to the King as private landlord, the "crown lands"; one part to the government as such, and one part to the chiefs as individual fee simple title holders. On completion of the Mahele in March 1848, the government held 1.5 million acres, the King held 1 million acres of crown lands and the chiefs as private landlords held 1.5 million acres.

No specific provision was made in the Mahele for distribution of land to the common people as tenants (hoaaina). It was stated as a principle that "the rights of the hoaaina must be respected," *Hawaiian Kingdom* at 284-89; *Levy* at 855, and it was generally understood that the

Mahele was intended to distribute one third of the Kingdom's land to the common people. It is plain, however, that "the common people never received the third of the lands presumably reserved for them." S. Doc. No. 151 at 82.

Legislation in 1850 was designed to give the hoaaina the opportunity to purchase their kuleana, the property they had occupied as feudal tenants on government land, crown land or the chiefs' land. *Levy* at 855; *Hawaiian Kingdom* at 291-94. The kuleana grant turned out to be illusory. First of all, it covered only lands "which a tenant had 'really cultivated,'" *Levy* at 855. This eliminated lands of the old ahupua'a that had been cultivated in common by a number of people, used for pasturage or simply used as a resource for forest products such as wood for building houses and canoes, firewood and the like. Second, the hoaaina had to prove his claim before the Land Commission and had to pay survey costs. Many Native Hawaiians were without the sophistication to "prove" a land claim, and most were too impoverished even to pay the less than $20

in survey costs. *See Levy* at 856.[5]

The kuleana legislation largely failed in providing land ownership to the native people of Hawaii. By the time the distribution process had ended, fewer than 30,000 acres -- less than one percent of the land area of the Island kingdom -- had been distributed to fewer than 9,000 individual Native Hawaiians. *Hawaiian Kingdom* at 293-94; *Levy* at 856. Later legislation, enacted in 1851, which provided for sale of government land to

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5 What happened to the Native Hawaiian residents of Niihau is illustrative. After petitioning for kuleana grants, the residents were unable to pay the surveying costs and in 1865 the entire island, 61,000 acres, was sold to a single Western entrepreneur for $10,000. Levy at 859; Breach of Trust at 4. The descendants of the 1865 purchaser, the Robinson family, own Niihau today. They appear to hold it as absentee lords of a feudal fiefdom, devoted mainly to livestock raising. It is reported that outsiders have great difficulty in obtaining access to Niihau without the owners' permission, that its Native Hawaiian residents (the owners' employees and their families) are discouraged from leaving, and that indeed English is not taught in the island's schools.

Native Hawaiians who had not been hoaaina and therefore did not qualify for kuleana grants, was no more successful. The legislation provided for the sale of lots of less than 50 acres at no less than fifty cents per acre and, as before, most Native Hawaiians did not even have the minimal amount of cash necessary for such purchases. *See Levy* at 857.

Meanwhile, in 1847 legislation permitted non-Hawaiians to acquire fee simple title to land which they occupied by lease or informal grant, on payment of a commutation fee to the King. The only restriction was that the land could not be resold to another foreigner. In 1850 even this restriction was removed, under the vigorous pressure -- including scarcely veiled threats of foreign military intervention -- of the United States government's resident commissioner in Hawaii. *Hawaiian Kingdom* at 296-97; *Levy* at 857 n. 62, 859.

Thus, by 1850 there was in place the legal structure that permitted Western capital to acquire ownership of the great bulk of valuable and productive land in

the Hawaiian Islands. Sugar cultivation provided economic incentive. A sugar planting boom began in 1850. In 1855 Hawaii exported 290,000 pounds of sugar; in 1858, 1.8 million pounds. Sugar growing and the sugar trade were controlled entirely by Westerners, mainly Americans and Britishers. Native Hawaiians gained no benefit from the new industry. Not a single Native Hawaiian owned a sugar plantation, and Native Hawaiians were "considered unsatisfactory and insufficient in numbers for a plantation labor supply." S. Stevens, *American Expansion in Hawaii, 1842-1898* at 34-35, 143, 145 (1968 ed.) (hereafter *Stevens*).

The Hawaiian plantation economy and society resembled that of the pre-Civil War South of the United States, "with a small and powerful planter aristocracy" -- English and American -- "in full possession of economic and social privileges." Instead of cotton, sugar was king, and dominated the Hawaiian economy. *Stevens* at 143; *Levy* at 858.

The planters' appetite for land was voracious. By 1893, over 600,000 acres

of government land had been sold, at an average price of 92 cents per acre. Westerners bought most of it. For example, by 1864, 213 Western purchasers had acquired more than 320,000 acres. Large tracts also were leased for agricultural purposes. By 1890, 76 lessees held more than three quarters of a million acres of crown and government land which they leased "at an annual rate of pennies per acre." *Levy* at 859.

Native Hawaiians did not long hold their kuleana. Owners of large ranches diverted water from the small holdings; their livestock trampled kuleana crops. At the same time kuleana holders had lost their ancient rights to pasture animals, raise crops and gather in the forests of the large holdings. Natural boundaries were obliterated. By a process of abandonment, adverse possession and purchase at nominal prices, most of the kuleana passed out of the possession of Native Hawaiians into Western hands. *Levy* at 861, 867-70; *Cohen* at 800.

Thus, in less than fifty years control of the Hawaiian economy and ownership

or control of the Hawaiian land, once the life's blood of its people, had passed out of Native Hawaiian hands and into the control of Westerners, chiefly Americans. By 1893 taxable land owned by Native Hawaiians amounted to a little over 250,000 acres. Much of this of course was in the hands of the remaining chiefly families and much, in turn, leased to Western interests. At the same time, over one million acres of taxable land were owned by non-Hawaiians. *Stevens* at 145.

With loss of their land came the virtual decimation of the Native Hawaiian people. From a population of 300,000 at the time of the first Western contact, by 1890 the Native Hawaiian people were reduced in numbers to 41,000. *Cohen* at 799; *Stevens* at 145. "By the last decade of the nineteenth century, Native Hawaiians had been excluded from the mainstream of the economy; they had lost ownership of most privately held land and had been reduced to a minority of the inhabitants of the kingdom." *Cohen* at 800 (footnotes omitted).

In 1893 the American settlers, sup-

ported by U.S. Marines from the U.S. cruiser *Boston*, rebelled against and overthrew Hawaii's last monarch, Queen Liliuokalani. Their plain purpose, to join Hawaii to the United States by annexation, was condemned by President Cleveland. In an 1893 message to Congress the President excoriated the U.S. Minister to Hawaii for improperly promoting annexation, condemned the landing of the U.S. Marines as obtained on false pretexts and "lawless," declared that in such circumstances U.S. acquisition of Hawaii would be unjustifiable and withdrew a proposed treaty of annexation from the Senate.[6] Five years later, in the wave of imperialism in McKinley's administration that saw the United States acquire an empire elsewhere in the Pacific and in the Caribbean,[7] Hawaii was annexed by the United

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6 President's Message Relating to the Hawaiian Islands, H.R. Exec. Doc. No. 47, 53d Cong., 2d Sess. XIII (1893).

7 The Philippine Islands, Guam, Cuba and Puerto Rico. See B. Tuchman, The Proud Tower at 145-67 (1966).

States.[8]

The rebel Republic had assumed control of the government lands in 1893 and had taken title to the crown lands in 1894. Its constitution expressly abrogated the trust for the people impressed upon the crown lands. *Liliuokalani v. United States*, 45 Ct.Cl. at 428. The crown and government lands passed to the United States with annexation. *Id.* at 436; *Levy* at 863; *Cohen* at 801.[9]

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8 See Cohen at 800; Levy at 861-65; E. Carpenter, America in Hawaii at 177-91, 233-248 (1899); L. Young, The Real Hawaii at 177 et seq., 297-303 (1899); Liliuokalani, Hawaii's Story by Hawaii's Queen (1964 ed.); Stevens, supra at 187-299; 3 R. Kuykendall, The Hawaiian Kingdom at 523-650 (1967).

9 Congressional expression of the annexation era is imbued with the jingoism typical of the period. For example, Congress' first look at the picture of land distribution in Hawaii reflected concern that any change in the situation might inhibit "the immigration of Anglo-Saxon settlers, who are now needed in order to maintain American institutions" and suggested that any change "may be perilous to American interests." H.R. Rep. 305, Government for the Territory of Hawaii, 56th Cong., 1st Sess. 15 (1900).

2.

The only effort the United States government has made to remedy the injustice done to the Hawaiian people in the name of American interests by American settlers and by the United States government, was the Hawaiian Homes Commission Act of 1920, 42 Stat. 108 *et seq.* (1921), formerly codified at 48 U.S.C. §§ 691-716. The Act set aside about 200,000 acres of land in the territory of Hawaii to be distributed as homesteads to Native Hawaiians, defined as persons of at least one half Native Hawaiian blood. *See* S. Doc. No. 151 at 84; *Levy* at 876; 48 U.S.C. former §§ 697, 698. The Act appears to have been engendered by the territorial legislature of Hawaii, and sponsored in the U.S. House of Representatives by Hawaii's nonvoting Delegate, Prince Jonah Kuhio Kalanianaole, who served as Delegate from 1903 to 1921; it has been called "a monument to [Prince Kalanianaole's] love for his people." S. Doc. No. 151 at 84. Its purpose, at least in the minds of the territorial legislature as presented to the Congress, was twofold: to recognize

that Hawaii's crown lands were impressed with a trust relationship, indeed "belong-[ed] to the common people" of Hawaii, *Proposed Amendments to the Organic Act of the Territory of Hawaii, Hearings before the House Committee on Territories*, 66th Cong., 2nd Sess. 32 (February 3, 4, 5, 7 and 10, 1920), and to provide an economic base for the improvement of the economic and social situation of the Native Hawaiian people. *See id.* at 26, 38. Even the Secretary of Interior of the time, Franklin K. Lane, viewed the setting aside of land for the Native Hawaiian people not as an act of grace by the Congress, but as an act that "should be done as a matter of justice -- belated justice." *Id.* at 123.

The Congress was animated by a purpose to restore some of Hawaii's land to the Native Hawaiian people "because," as the Committee chairman declared, "the Hawaiians were deprived of their lands without any say on their part, either under the Kingdom, under the republic or under the United States government." *Id.* at 170. The Committee report reiterated that the Native Hawaiian population "assumed that

the ... [land] ... was being held in trust by the crown for their benefit," and recognized that the land indeed never had been transferred and that the rebel Republic of Hawaii had "arbitrarily seized" the lands. H.R. Rep. No. 839, 66th Cong., 2nd Sess. 5 (1920). In the floor debates, Del. Kalanianaole argued for the legal and moral rights of the Native Hawaiian people to have land set aside for their benefit, 59 CONG. REC. 7453 (1920). There is no indication in the debates that his arguments were not sympathetically received. *Id.* at 7447-457, 7495-504.

The bill that finally became the Hawaiian Homes Commission Act was introduced in the next Congress. In a second set of hearings, the chairman of the Committee on Territories noted that the motivating factor behind the legislation was similar to that behind similar legislation relating to Indian tribes: "because we came to this country and took their land away from them .... why can we not do the same thing for the Hawaiians whose land was taken away from them ...." *Proposed Amendments to the Organic Act of the Ter-*

ritory of Hawaii, Hearings on H.R. 7257 before the House Committee on Territories, 67th Cong., 1st Sess. 141 (June 9 and 10, 1921).

When Hawaii was admitted to the Union, congressional action reaffirmed the principle of restitution that motivated the setting aside of lands for Native Hawaiians. Section 4 of the Hawaii Admission Act, P.L. 86-3, 73 Stat. 4, 48 Prec. U.S.C. § 491 *et seq.* (1959), made the Hawaiian Homes Commission Act and its land set-aside provision part of a compact between Hawaii and the United States, included in the Constitution of Hawaii. In the Senate debates on Hawaii's admission Senator Jackson, sponsor of the bill, explained section 4 as dealing

> with a problem arising out of the original acquisition by the United States of the Hawaiian Islands. As a condition, our Government promised to retain certain lands for the benefit of the Native born Hawaiians. The Hawaiian Homes Commission Act of 1920 expresses the intent of Congress to adhere to that promise.

105 CONG. REC. 3845 (1959). In the House,

Chairman Aspinall of the Committee on Interior and Insular Affairs stated that the purpose of the homestead set-aside provision "was, of course, to give to the Hawaiian people 50% or more Hawaiian blood *the right to ownership and use of some of the land that was taken away from them* when the treaty was originally made." 105 CONG. REC. 4005 (1959) (emphasis added).

3.

But the promise of the Hawaiian Homes Commission Act has never been fulfilled. As of 1938, the Congress noted, "[o]nly a small part of this area has of yet been used, the remainder being held in trust for future projects, and leased temporarily in the meantime." S. Doc. 151 at 84. As late as 1975, only 15% of the Hawaiian homestead lands were in the possession of Native Hawaiians. Only 69 families lived on ranch-sized parcels, 365 families lived on farms and 2,000 families had been assigned urban or rural houselots. As the authoritative commentator on Native Hawaiian land rights wrote: "the Hawaiian Homes program must be considered a failure as measured by its

original objective to rehabilitate Native Hawaiians by returning them to a farming life .... Today the greatest demand for homesteads is for urban houselots, and accounts of 20-year waits for houselots on land-short Oahu have been documented." *Levy* at 877 (footnotes omitted). As he concluded, the reason for the failure has been the desire of the State of Hawaii (administrator of the homestead program since statehood) to maximize revenue from the land by leasing it, for example to agricultural interests in large parcels, in preference to its distribution to those who are the intended beneficiaries. *Id.* at 877-79.

Matters have moved little since. The situation today is reflected in the findings of an intergovernment task force issued in August of this year. Federal-State Task Force on the Hawaiian Homes Commission Act, *Report to the United States Secretary of the Interior and the Governor of the State of Hawaii* (August 15, 1983) (hereafter *Task Force Report*).[10]

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[10] The appointment of the task force, in

The task force affirmed that "the goal" of the Homestead program "was and still is to enable native Hawaiians to return to their lands in order to provide for their self-sufficiency, initiative, and preservation of native Hawaiian culture." *Task Force Report* at 14. It found, however, that this goal was still a dream:

> as of May 31, 1983, 7,901 applicants continue to wait for homestead awards. In addition the State has not identified with precision the Hawaiian Home lands that constitute the assets of the trust; it has not at all times accounted accurately for revenues associated with trust lands; it has not maintained auditable financial records

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July 1982, was the result of a lawsuit filed by amici curiae and other Native Hawaiians. The lawsuit, against the Attorney General and the United States, sought to compel the United States, as Trustee of the crown and government lands received with annexation, to compel the State of Hawaii to fulfill its duty to distribute the lands as homesteads to the Native Hawaiian people. Task Force Report at 7. The lawsuit is in abeyance pending action by the federal and state governments to carry out the task force's recommendations.

> and statements; and, it has entered into conveyances and encumbrances of Hawaiian Home lands that have not been authorized by law.

Task Force Report at 22. Of the nearly 8,000 pending applications, over 4,000 were for residential houselot homesteads on the island of Oahu, location of Hawaii's principal city and capital, Honolulu. Beneficiaries sometimes must wait as long as 30 years to receive homesteads. *Task Force Report* at 26. Many have died while on the waiting list.

More than 30,000 acres of Hawaiian homestead land have been removed from the set-aside program in violation of the terms of the Hawaiian Homes trust. Some land is leased at ridiculously low rentals. For example, some land is leased to the United States Department of Defense at $1 an acre; 16,000 acres are under lease from the Hawaiian Department of Land and Natural Resources at only $5 per acre per year.[11]

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[11] Task Force Report at 39, 41, 45, 51. A 1982 report by the Inspector General of the United States Department of Interior docu-

The task force recommended that the award of homesteads to Native Hawaiians be accelerated and that during the next five years the State and the United States

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ments the federal and state governments' neglect of their stewardship of their trust of Native Hawaiian home lands. Audit Report, "Review of Hawaiian Homes Commission Act Programs Operated by Department of Hawaiian Home Lands, State of Hawaii," September 8, 1982, reproduced in Native Hawaiian Study Commission, Report on the Culture, Needs and Concerns of Native Hawaiians Pursuant to Pub. L. 96-565, Title III at 372 et seq. (1983). About 17,000 acres of the total acreage originally set aside and later acquired for the program inexplicably have been lost. Some of this appears to be valuable sugar cane land. Over 13,000 acres were illegally "withdrawn" by the State under "Governor's Executive Orders." The State has kept revenues from these "withdrawn" lands, instead of applying them to trust uses. As of 1981, only 26,062 acres of land had been distributed to 3,034 homesteaders with an additional 13,706 acres used as community pasture. As noted above, nearly 8,000 applicants wait. The farm homestead program is in serious trouble. The Inspector General estimated that completion of the program would require $600 million. Report at 380-92. The State's cash management is faulty; interest that should be earned is lost. No financial statements are prepared; the accounts cannot be audited. Id. at 393.

should each appropriate 25 million dollars per year to enable the program to be carried out. *Task Force Report* at 29, 32.

The task force pointed out that both the State and the federal government have continuing trust responsibilities to the Native Hawaiian people. These include a possible action by the United States against the State for breach of trust. *Task Force Report* at 19-22. On September 27, 1983, the Secretary of Interior declared his acceptance of the Task Force Report and its recommendations -- including the United States' obligation to bring suit as a last resort if the task force's recommendations are not carried out.[12]

4.

The ownership of land in Hawaii today is as concentrated as it was in the days of the Kingdom. There are eight major islands in the Hawaiian chain, which make up the more than four million acres of land

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12 Letter from Secretary of Interior James Watt to Hon. George R. Ariyoshi, September 7, 1983, with attached Response of the Secretary of the Interior to the Recommendations of the Federal-State Task Force on the Hawaiian Homes Commission Act.

in the state. The island of Kahoolawe, 28,800 acres, is almost entirely owned by the federal government. The island of Niihau, 46,000 acres,[13] is almost entirely owned by a single company owned by a single family. Most of the land is used for grazing. The island of Lanai, 90,000 acres, is almost entirely owned by a major corporation, Castle & Cooke, Inc., a company founded by early American settlers more than a century ago. Most of Lanai is used for grazing and the growing of pineapples.

Overall, the state government owns a little under 39% of the total land area in the state, the federal government owns a little less than 10%, and only 72 private landowners, owning tracts of 1,000 acres or more, own 47%. This leaves less than 5% of the land in Hawaii available for a population of approximately one million.

Nor do these figures tell the whole story. The 18 largest landholders, with tracts of 21,000 acres or more, own more

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13 The discrepancy between this figure and that given at p. 15 n. 5 supra is in the sources.

than 40% of the state's land area.[14] On Oahu, the most urbanized of the islands, as of 1975 only 22 landowners owned 72.5% of all land on the island. Jurisdictional Statement at 1. The Bishop Estate, whose trustees, appellees here, seek a declaratory judgment that the Land Reform Act at issue in this case is unconstitutional, owns 9% of all of the land of the state. Five corporations[15] together own more than 13%; a single ranch, the Parker ranch on the "Big Island" of Hawaii, owns close to 5%.[16] One "estate" owns 3.5%, another a shade under 2%.

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14 The figures (except for Oahu) in this and the preceding paragraph are 1967 statistics. State of Hawaii, Legislative Reference Bureau, Report No. 3, 1967, Public Land Policy in Hawaii: Major Landowners (1969 reprint).

15 Castle & Cooke, Inc., C. Brewer & Co., Ltd., Alexander & Baldwin, Inc., Amfac, Inc. and Theo H. Davies & Co., Ltd. (the legendary "big five").

16 The Parker ranch's history is illustrative of how Westerners acquired, and kept, Hawaii's land:

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The hardship, the inflated prices for residential housing and the inability to purchase homes which (appellant argues) motivated the State of Hawaii in enacting the legislation at issue here, Jurisdictional Statement at 2-4, burdens the Native Hawaiians more heavily than any other residents of the state. The disadvantaged economic situation in which they find themselves makes it especially difficult for Native Hawaiians to acquire a decent

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By 1815 thousands of wild cattle roamed the hills of northern Hawaii, trampling crops and terrorizing farmers. Finally, Kamehameha [I] permitted a young Massachusetts sailor, John Palmer Parker, to shoot the cattle and supply salted beef to foreign vessels and local people. Parker married into a prominent Hawaiian family and established what is now one of the largest privately owned cattle ranches in the U.S.

The sprawling 224,000-acre Parker Ranch at the base of Mauna Kea and its 45,000 head of cattle are now owned by Richard Palmer Kaleioku Smart, sixth generation of the family. The ranch is so big its climate varies from desert to tropical rain forest.

L. Levathes, Kamehameha, Hawaii's Warrior King, 164 National Geographic 558, 589 (November 1983).

home -- as is evidenced by the thousands of applicants for houselot homesteads, who wait, seemingly forever, for the State to provide a homestead out of lands set aside more than 60 years ago by the United States government solely for the benefit of Native Hawaiians (*see* p. 29 *supra*).

Native Hawaiians recognize that it is unlikely that the administration of the Land Reform Act will directly benefit many of them. If, as seems likely, the State sells the land condemned under the statute at Hawaii's presently inflated land prices, few Native Hawaiians will be in a position to purchase. Nevertheless, the Native Hawaiians hope that the condemnation and distribution of properties under the Act will relieve the pressure on land prices from more affluent non-Native Hawaiians who bid prices up because of the shortage of residential land for sale.[17]

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[17] Appellees are trustees of the Bishop Estate, established by the Will of Princess Bernice Pauahi Bishop, a descendant of King Kamehameha I. It is a charitable trust whose intended beneficiaries are the Native Hawaiian people. The Estate's net income supports the Kamehameha Schools,

Moreover, Native Hawaiians believe that this Court's recognition of the desirability of distribution of land held in the iron grip of large holders, and of the principle that the social utility of such distribution confirms the constitutionality of legislation providing for it, will provide impetus to more rapid distribution to Native Hawaiians of homesteads under the Hawaiian Homes Commission Act.

CONCLUSION

The Native Hawaiian people were deprived of nationhood in the flush of

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whose policy is to accept children of Hawaiian blood as students; but its residential properties are leased almost entirely to non-Hawaiians. To the extent that lessees presently make the Estate's Native Hawaiian beneficiaries scapegoats for their inability to purchase and for extraordinarily high housing costs, the Land Reform Act's requirement that residential property be sold to lessees may lessen resentment against the Estate, its trustees (whose compensation from the Estate exceeds $200,000 each) and its Native Hawaiian beneficiaries. Sale proceeds also may provide greatly increased resources for the Estate to apply to the benefit of Native Hawaiians in a variety of ways.

American expansion. They have been severed from the land that nourished them and their culture, an injustice that the Congress, in the Hawaiian Homes Commission Act, and the recent Federal-State Task Force, have sought to correct at least in part. *Amici* urge this Court to consider the century or more of injustice that they have suffered, and their right to restoration to their ancestral land -- which is based on the principle that land may be redistributed to serve the needs of the people.[18]

The Native Hawaiian people are not only acutely aware of their own plight, but they are also sensitive to the legitimate needs of others for land. The

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18 As amicus Maui Loa has stated, in the course of his advocacy of the rights of his people: "The judicial power of the United States should be exercised to right the wrongs of the past that inadvertently or otherwise were committed by the United States of America in her eagerness to Westernize the Hawaiian Islands. The right to private property, accompanied by radical change in cultural values and lifestyle, has had the effect of leaving many Native Hawaiians impoverished and homeless in their own homeland."

Hawaii Land Reform Act is intended to promote the general welfare and meet the needs of today's multi-culture society in Hawaii. This Act, together with full, accelerated implementation of the Hawaiian Homes Commission Act, for which *amici* continue to strive, holds a promise of fulfillment, at last, of the stated intent of the Great Mahele -- to place the native people of Hawaii in full possession of their land.

Respectfully submitted,

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